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Fanuc Sdn Bhd v Adenland (Cheras) Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1268-07 OF 2019
NOR BEE ARIFFIN, NANTHA BALAN AND MARIANA YAHYA JJCA
28 JULY 2021

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Civil Procedure — Pleadings — Failure to plead — Failure to plead defence — First respondent did not plead that second respondent was independent contractor — First respondent did not plead that appellant consented to respondents' conduct — Whether respondents could rely on defences which were not pleaded

D

Evidence — Adverse inference — Failure to call witness — First respondent failed to call relevant and material witnesses — Whether this was a fit and proper case for adverse inference under s 114(g) of the Evidence Act 1950 to be drawn against first respondent — Evidence Act 1950 s 114(g)

E

Tort — Vicarious liability — Principal's liability for agent's wrongful act — Trespass to land by agent — First respondent appointed second respondent to carry out excavation works — Second respondent trespassed into appellant's land — High Court allowed appellant's action premised on trespass and negligence against second respondent but dismissed appellant's action against first respondent — Whether second respondent was the first respondent's agent — Whether first respondent as principal should be jointly and severally liable for trespass — Whether appellant entitled to claim for cost of the earth that was removed, reinstatement cost and aggravated and exemplary damages

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Adenland (Cheras) Sdn Bhd ('the first respondent') had appointed Prestasi Infra Bina Sdn Bhd ('the second respondent') to carry out excavation works. The works were supervised by Simon Lim on the part of the second respondent whereas the representative for the first respondent for the purpose of supervision of the conditions imposed by Majlis Perbandaran Kajang ('MPK') was the first respondent's consulting engineers known as Perunding Intask represented by its clerk of works known as Andy. In the process of carrying out such works, the appellant discovered that the second respondent had trespassed into the appellant's land. It ought to be noted that the appellant was planning to build hilltop bungalows on the said land but the second respondent in committing the trespass had reduced the height of the appellant's land. Consequently, the appellant sued the respondents for trespass and negligence. The High Court judge ('the HCJ') had allowed the claim against the second

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respondent but dismissed the claim against the first respondent although the HCJ found that the second respondent was the agent of the first respondent. The HCJ had exonerated the first respondent from any liability for the trespass as there was no evidence that the first respondent participated in the actual physical act of trespass, or evidence to suggest that the first respondent had instructed the second respondent to commit trespass or that first respondent's plan, which was approved by MPK, would have resulted in the trespass. The HCJ further held that there was no evidence that the first respondent was aware that the second respondent had trespassed into the appellant's land. In the present appeal, the appellant argued that the first respondent should be jointly and severally liable together with the second respondent, for the trespass that was committed by the latter. Further, the appellant was dissatisfied with the HCJ's decision in rejecting: (a) the appellant's claims for the sum of RM73,470 being the value of earth that was removed from the appellant's land; (b) the reinstatement cost of RM1,362,405 for a 6.4 meter wall — in respect of the reinstatement cost, the first respondent submitted that PW7's design was 'tentative' and the design was not final, due to inaccuracy of number of bore holes, pile size, lack of soil test etc; and (c) aggravated and exemplary damages. The main issue in the present appeal was whether the first respondent as the second respondent's principal should be jointly and severally liable for trespass.

Held, allowing the appeal, and setting aside the order of the High Court with costs of RM150,000 here and below subject to allocatur:

(1) It was trite that a defendant was not entitled to pursue a defence which had not been pleaded. In the present case, the first respondent's defence was mostly one of 'denial', 'no knowledge' and/or 'put to strict proof'. The first respondent did not plead any affirmative defence. The first respondent's defence regarding the appellant's consent to carry out the earthworks was not pleaded. Similarly, the first respondent's contention that the second respondent was an independent contractor was also not pleaded. The law was firmly established from several decisions of the Federal Court that a judgment was unsustainable if it was decided contrary to the pleadings before it (see paras 27, 29, 33, 125 & 129).

(2) Majlis Perbandaran Kajang gave permission to the first respondent to carry out the infrastructure work which was legitimately outsourced to the second respondent. By appointing the second respondent to carry out the work which the first respondent themselves were supposed to carry out, the second respondent became the first respondent's agent. In addition, the HCJ had made a finding in para 50 of his judgment that the second respondent was the first respondent's 'agent' and since there was no cross-appeal by the first respondent, it meant that first respondent had accepted that the second respondent was their 'agent' (see paras 69–70).

(3) Both Perunding Intask and its representative, Andy who was the clerk of works were relevant and material witnesses, but they did not testify. Further, since the second respondent was the first respondent's agent, it would have been more appropriate for the first respondent to call Simon Lim as a witness, but similarly, he was not called by the first respondent. Given the circumstances, the court found that if Andy, the engineer from Perunding Intask and Simon Lim had testified, their evidence would in all likelihood, have been unfavourable to the first respondent. Hence, the court was satisfied that this was a fit and proper case for an adverse inference under s 114(g) of the Evidence Act 1950 to be drawn against the first respondent, by reason of the non-calling of these witnesses (see paras 94 & 112–113).

(4) The legal position in so far as the principal's liability for the tort that was committed by an agent was that the principal was not liable for the tort(s) committed by their agent, save where it was established that the principal had given their prior authority or subsequently ratified or gave their assent to the commission of the tort. In the present case, there were several bits of compelling circumstantial evidence which fixed the first respondent with liability for trespass. Firstly, the first respondent's conduct in remunerating the second respondent in full despite knowing that the second respondent had committed trespass and had created a potential legal problem for the first respondent. Secondly, the first respondent did not even seek an indemnity from the second respondent for the potential legal dispute that was on the horizon. Thirdly, there was also no paper trail of any reprimand by the first respondent to the second respondent. Lastly, the first respondent's conduct in appointing the second respondent to construct the retaining wall despite the trespass by the second respondent. For the above reasons, the first respondent was liable for the tortious act of their contractor (agent), the second respondent. Therefore, the HCJ's decision that the first respondent was not liable was plainly wrong and appellate intervention was therefore warranted (see paras 71, 114–115 & 132).

(5) The first respondent did not dispute that the appellant was entitled to the cost of the earth that was removed. In respect of the reinstatement cost, PW7 was of the view that whilst there could be some changes, the design was final. PW7 had clearly explained during cross-examination regarding the 'bore holes' whereby he testified that two bore holes was good enough to come up with a design. There was no expert rebuttal report by the first respondent. The fact that the appellant had not obtained MPK's approval for the construction of a retaining wall of 6.4 meters was not a bar to an award (reinstatement cost) being granted. Therefore, the appellant should have been awarded the sum of RM1,362,405 as reinstatement cost (see paras 133–134 & 138–139).

(6) Based on the facts, it was clear that the first respondent was seeking to gain at the expense of the appellant. The first respondent knew from the inception, ie the February/March 2014 encounter with the appellant, of the appellant's wishes to maintain the height of its land as it was planning to develop hilltop bungalows, and thus, by 'cutting' the slope and reducing the height, it would deprive the appellant of such a plan. The facts here were such that the conduct of the first respondent was plainly egregious and exemplary damages were warranted. In the circumstances of this case and considering the first respondent's conduct in their entirely, the court held that this was a fit and proper case to award general and exemplary damages in the sum of RM500,000 (see para 143).

[Bahasa Malaysia summary

Adenland (Cheras) Sdn Bhd ('responden pertama') telah melantik Prestasi Infra Bina Sdn Bhd ('responden kedua') untuk menjalankan kerja-kerja penggalian. Kerja-kerja tersebut diselia oleh Simon Lim di pihak responden kedua manakala wakil responden pertama bagi tujuan penyeliaan syarat-syarat yang dikenakan oleh Majlis Perbandaran Kajang ('MPK') adalah jurutera perunding responden pertama yang dikenali sebagai Perunding Intask yang diwakili oleh kerani kerjanya yang dikenali sebagai Andy. Dalam proses menjalankan kerja-kerja tersebut, perayu mendapati bahawa responden kedua telah menceroboh tanah perayu. Perlu diingat bahawa perayu bercadang untuk membina beberapa banglo atas bukit di atas tanah tersebut tetapi responden kedua dalam melakukan pencerobohan tersebut telah mengurangkan ketinggian tanah perayu. Akibatnya, perayu menyaman responden-responden atas pencerobohan dan kecuaian. Hakim Mahkamah Tinggi ('HMT') telah membenarkan tuntutan terhadap responden kedua tetapi menolak tuntutan terhadap responden pertama walaupun HMT mendapati responden kedua adalah ejen responden pertama. Hakim Mahkamah Tinggi telah membebaskan responden pertama daripada apa-apa liabiliti di bawah pencerobohan kerana tiada keterangan bahawa responden pertama mengambil bahagian dalam tindakan fizikal sebenar pencerobohan, atau keterangan yang menunjukkan bahawa responden pertama telah mengarahkan responden kedua untuk melakukan pencerobohan atau pelan responden pertama yang diluluskan oleh MPK akan mengakibatkan pencerobohan tersebut. Hakim Mahkamah Tinggi seterusnya berpendapat bahawa tiada keterangan bahawa responden pertama menyedari bahawa responden kedua telah menceroboh tanah perayu. Dalam rayuan ini, perayu berhujah bahawa responden pertama harus bertanggungjawab secara bersama dan berasingan dengan responden kedua, atas pencerobohan yang dilakukan oleh responden kedua. Selanjutnya, perayu tidak berpuas hati dengan keputusan HMT yang menolak: (a) tuntutan perayu untuk jumlah RM73,470 bagi nilai tanah yang dikeluarkan dari tanah perayu; (b) kos pengembalian semula sebanyak RM1,362,405 untuk dinding setinggi 6.4 meter — berkenaan dengan kos pengembalian semula, responden pertama menyatakan bahawa reka bentuk PW7 adalah 'tentatif' dan reka

bentuk tersebut tidak muktamad, disebabkan ketidaktepatan bilangan lubang gerudi, saiz cerucuk, kekurangan ujian tanah dan lain-lain; dan (c) ganti rugi teruk dan teladan. Isu utama dalam rayuan ini ialah sama ada responden pertama sebagai prinsipal responden kedua harus bertanggungjawab secara bersama dan berasingan atas pencerobohan.

Diputuskan, membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi dengan kos RM150,000 di mahkamah ini dan mahkamah bawahan tertakluk kepada alokatur:

(1) Telah menjadi undang-undang yang mantap bahawa defendan tidak berhak untuk meneruskan pembelaan yang tidak diplid. Dalam kes ini, pembelaan responden pertama kebanyakannya adalah 'penafian', 'tiada pengetahuan' dan/atau 'diletakkan beban bukti yang kukuh'. Responden pertama tidak membuat apa-apa pembelaan yang afirmatif. Pembelaan responden pertama berhubung persetujuan perayu untuk menjalankan kerja penggalian tanah tersebut tidak diplid. Begitu juga dengan hujahan responden pertama bahawa responden kedua adalah kontraktor bebas juga tidak diplid. Undang-undang telah ditetapkan dengan kukuh daripada beberapa keputusan Mahkamah Persekutuan bahawa sesuatu penghakiman adalah tidak mampan jika ia diputuskan bertentangan dengan pliding di hadapannya (lihat perenggan 27, 29, 33, 125 & 129).

(2) Majlis Perbandaran Kajang memberi kebenaran kepada responden pertama untuk menjalankan kerja-kerja infrastruktur yang secara sah disumber luarkan kepada responden kedua. Dengan melantik responden kedua untuk menjalankan kerja yang sepatutnya dijalankan oleh responden pertama, responden kedua telah menjadi ejen responden pertama. Di samping itu, HMT telah membuat dapatan di perenggan 50 penghakimannya bahawa responden kedua adalah 'ejen' responden pertama dan oleh kerana tiada rayuan balas oleh responden pertama, ini bermakna responden pertama telah menerima bahawa responden kedua adalah 'ejen' mereka (lihat perenggan 69–70).

(3) Kedua-dua Perunding Intask dan wakilnya, Andy yang merupakan kerani kerja adalah saksi-saksi yang relevan dan penting, tetapi mereka tidak memberi keterangan. Selanjutnya, memandangkan responden kedua adalah ejen responden pertama, adalah lebih sesuai untuk responden pertama memanggil Simon Lim sebagai saksi, tetapi, dia juga tidak dipanggil oleh responden pertama. Berdasarkan keadaan tersebut, mahkamah mendapati bahawa jika Andy, jurutera dari Perunding Intask dan Simon Lim memberi keterangan, keterangan mereka berkemungkinan besar, tidak memihak kepada responden pertama. Oleh itu, mahkamah berpuas hati bahawa ini adalah kes yang sesuai dan wajar untuk inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 dibuat terhadap responden pertama, atas sebab saksi-saksi ini tidak

dipanggil (lihat perenggan 94 & 112–113). A

(4) Kedudukan undang-undang berkaitan dengan liabiliti prinsipal untuk tort yang dilakukan oleh ejen adalah bahawa prinsipal tidak bertanggungjawab ke atas tort yang dilakukan oleh ejen mereka, kecuali di mana ia telah dibuktikan bahawa principal pada awalnya telah memberikan kuasa atau kemudiannya mengesahkan atau memberikan persetujuan mereka kepada pelakuan tort tersebut. Dalam kes ini, terdapat beberapa keterangan mengikut keadaan yang mendorong yang meletakkan responden pertama dengan liabiliti untuk pencerobohan. Pertama, kelakuan responden pertama dalam memberi imbuhan sepenuhnya kepada responden kedua walaupun mengetahui bahawa responden kedua telah melakukan pencerobohan dan telah menimbulkan masalah undang-undang kepada responden pertama. Kedua, responden pertama tidak meminta ganti rugi daripada responden kedua untuk potensi permasalahan undang-undang yang akan berlaku. Ketiga, tiada juga jejak kertas tentang apa-apa teguran oleh responden pertama kepada responden kedua. Akhir sekali, tindakan responden pertama melantik responden kedua untuk membina tembok penahan walaupun responden kedua telah melakukan pencerobohan tersebut. Atas sebab-sebab di atas, responden pertama bertanggungjawab atas perbuatan tort kontraktor (ejen) mereka iaitu responden kedua. Oleh itu, keputusan HMT bahawa responden pertama tidak bertanggungjawab adalah jelas salah dan campur tangan rayuan adalah wajar (lihat perenggan 71, 114–115 & 132). B C D E F

(5) Responden pertama tidak mempertikaikan bahawa perayu berhak mendapat kos tanah yang dikeluarkan. Berkenaan dengan kos pengembalian semula, PW7 berpendapat bahawa walaupun terdapat beberapa perubahan, reka bentuk adalah muktamad. PW7 telah menjelaskan dengan jelas semasa pemeriksaan balas mengenai 'lubang gerudi' di mana beliau memberi keterangan bahawa dua lubang gerudi cukup bagus untuk menghasilkan reka bentuk. Tiada laporan sanggahan pakar oleh responden pertama. Fakta bahawa perayu tidak mendapat kelulusan MPK untuk pembinaan tembok penahan setinggi 6.4 meter bukanlah penghalang kepada pemberian award (kos pengembalian semula). Oleh itu, perayu sepatutnya diberikan jumlah RM1,362,405 sebagai kos pengembalian semula (lihat perenggan 133–134 & 138–139). G H

(6) Berdasarkan fakta, adalah jelas bahawa responden pertama ingin mendapatkan keuntungan atas perbelanjaan perayu. Responden pertama mengetahui dari awal, iaitu semasa pertemuan pada Februari/Mac 2014 dengan perayu berkenaan hasrat perayu untuk mengekalkan ketinggian tanahnya kerana ia merancang untuk membangunkan banglo di atas bukit, dan dengan itu, dengan 'memotong' cerun dan mengurangkan I

ketinggian, ia akan menghalang perayu daripada meneruskan dengan pelan tersebut. Fakta di sini adalah bahawa kelakuan responden pertama adalah jelas sangar teruk dan ganti rugi teladan adalah wajar. Dalam keadaan kes ini dan mempertimbangkan kelakuan responden pertama sepenuhnya, mahkamah berpendapat bahawa ini adalah kes yang sesuai dan wajar untuk memberikan ganti rugi am dan teladan dalam jumlah RM500,000 (lihat perenggan 143).]

Cases referred to

Ambank (M) Bhd v Luqman Kamil Mohammed Don [2012] 3 MLJ 1; [2012] 3 CLJ 551; [2012] 1 AMCR 546, FC (refd)

Arnica Corporation Sdn Bhd v Robert Teo Keng Tuan & Anor & Other Appeals [2016] 2 MLJ 119 ; [2015] 1 LNS 1220, CA (refd)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004]1 CLJ 357; [2004] 1 AMR 333, CA (refd)

Desiree Couture Sdn Bhd & Anor v Anne F Co Ltd & Ors [2016] 10 MLJ 315; [2016] 2 CLJ 942; [2015] AMEJ 1799, HC (refd)

Fanuc Sdn Bhd v Adenland (Cheras) Sdn Bhd & Anor [2019] MLJU 537; [2019] 6 AMR 48; [2019] AMEJ 0619; [2020] 5 CLJ 489, HC (refd)

Freeman v Rosher (1849) 13 QB 780 (refd)

Harmony Shipping Co SA v Saudi Europe Line Limited ('The Good Helmsman') [1979] 1 WLR 1380, CA (refd)

Regina Fur Co Ltd v Bossom [1958] 2 Lloyd's Rep 425, CA (refd)

Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492; [2015] 9 CLJ 153; [2015] 6 MLRA 248, FC (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2015] AMEJ 1824, FC (refd)

Say Chong Sdn Bhd & Ors v Chuah Guat Kooi (P) & Ors [2009] MLJU 526; [2009] 1 LNS 590, HC (refd)

Steven Phao Cheng Loon v Highland Properties Sdn Bhd [2000] 4 MLJ 200; [2000] 4 CLJ 508, HC (refd)

Woo Yew Chee v Yong Yong Hoo [1979] 1 MLJ 131; [1978] 1 LNS 240, FC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Rules of Court 2012 O 16 r 8

Appeal from: Suit No WA-22NCVC-120–03 of 2017 (High Court, Kuala Lumpur)

Lam Ko Luen (Jeremy Ooi Jian Rong with him) (Shook Lin & Bok) for the appellant.
Ong Swee Long (Ong Kang Nyong with him) (Armiy Rais) for the first respondent.
Not represented for the second respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned judge of the High Court (after a full trial) in Kuala Lumpur High Court Suit No WA-22NCvC-120–03 of 2017 ('Suit 120'). The appellant in this appeal is Fanuc Sdn Bhd (plaintiff in Suit 120). The first respondent is Adenland (Cheras) Sdn Bhd (first defendant) and the second respondent is Prestasi Infra Bina Sdn Bhd (second defendant). For convenience, consistency, and to avoid confusion, we shall refer to the appellant, the first respondent and second respondent as plaintiff, D1 and D2, respectively.

[2] On 6 March 2017, the plaintiff filed Suit 120 against D1 and D2 based on causes of action in negligence and trespass. D2 did not defend the action. Likewise, D2 (qua second respondent in this appeal) did not respond to this appeal. By a decision dated 19 June 2019, the judge dismissed the plaintiffs claim against D2 with costs of RM80,000. The judge allowed the plaintiffs claim against D2, and ordered D2 to pay RM80,841.78 as special damages, and RM500,000 as general damages with 5% interest per annum from the date of filing ofthe action to the date of full realisation, and costs of RM40,000. The judge disallowed the plaintiffs claim for RM73,470 being the value of earth that was wrongfully removed from the plaintiffs land. The judge also disallowed the sum of RM1,362,405 as reinstatement cost. Finally, the judge also rejected the plaintiffs claim for aggravated and exemplary damages. The decision of the High Court is reported as *Fanuc Sdn Bhd v Adenland (Cheras) Sdn Bhd & Anor* [2019] MLJU 537; [2019] 6 AMR 48; [2019] AMEJ 0619; [2020] 5 CLJ 489 (HC).

[3] Essentially, the plaintiff is aggrieved with the High Court's decision in exonerating D1 from liability for trespass. According to the plaintiff, D1 should be jointly and severally liable together with D2, for the trespass that was committed by the latter. The plaintiff is also aggrieved that the High Court did not order a further sum of RM73,470 being the value of earth that was removed from the plaintiff's land. The plaintiff is also aggrieved that the judge rejected the claim for RM1,362,405 as reinstatement cost, as well as the claim for aggravated and exemplary damages.

A BACKGROUND FACTS

[4] The plaintiff is the registered proprietor of land held under Lot 14761 (formerly known at Lot 1169, Geran Mukim 1129, Cheras Batu 9, Mukim of Ulu Langat, Daerah Ulu Langat, Selangor) ('the plaintiff's land'). D1 was the B owner of land held under PT 5700 and PT 5701, Mukim Hulu Langat, Daerah Hulu Langat, Selangor Darul Ehsan measuring approximately 3.36 acres. We shall refer to the lands held under PT 5700 and PT 5701, Mukim Hulu Langat, Daerah Hulu Langat, Selangor Darul Ehsan as 'the project land'.

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[5] D1 intended to undertake a proposed building development on the project land known as 'Cadangan Pembangunan Perumahan yang mengandungi 1 Blok Pangsapuri 23 Tingkat, 2 Blok Pangsapuri (Low Rise) 4 Tingkat, Kemudahan Rekreasi di Tingkat Podium Di Atas 2 Tingkat Tempat D Letak Kereta' di atas PT 5700 dan 5701, seluas 3.36 ekar, Mukim Hulu Langat, Daerah Hulu Langat, Selangor Darul Ehsan' ('the project').

[6] The project was approved by the Majlis Perbandaran Kajang ('MPK') in 2014. The project land was located quite close to the plaintiffs land which was E on a higher elevation. The plaintiffs land and the project land are separated by a road reserve, and an access road known as Jalan Kemacahaya ('the access road'). The access road was 'S' shaped and meandered through the project land. It is not denied that the contour and path of the access road did not allow D1 to fully utilise the project land. Hence, D1 wanted to 'straighten' the access F road. MPK gave their approval for the access road to be straightened. D1 had previously approached the plaintiff to get them to consent to the height of the plaintiffs land being 'trimmed'. Hence, if the height of the plaintiffs land was reduced, then there would be no need for a high retaining wall. But the plaintiffs consent was not forthcoming. On 10 September 2014, D1 issued a G letter of award and engaged D2 to carry out works which were known as the 'Main Access Diversion Infrastructure Work'. It is necessary to mention that the construction of the retaining wall was not at all within the scope of the letter of award. D2 was given all the necessary plans and they were specifically instructed that they should detennine the boundaries before carrying out the H infrastructure work.

[7] Whilst carrying out the work (per the letter of award), D2 encroached and cut into the plaintiffs land and excavated a vast amount of eatih. The consequence of the encroachment and cutting/excavation was that the height I of the plaintiffs land was considerably reduced. The plaintiff was livid. D1 claimed that D2 informed them about the trespass. D1 approached the plaintiff and made attempts to placate them. There were negotiations between D1 and the plaintiff to resolve the matter. But eventually there was no consensus and the settlement process just fell through.

[8] D1 did not remedy the situation and the plaintiffs land was left in the state that it was post trespass, vis cut down considerably and no longer of the same height as it was before the trespass took place. As mentioned earlier, the plaintiffs claim against D2 was allowed whilst the claim against D1 was dismissed. The judge disallowed the cost of the earth that was removed, reinstatement cost, and aggravated and exemplary damages.

THE DISPUTE

[9] As mentioned earlier, D1 intended to divert (straighten) the access road and construct a retaining wall along the road reserve which was located below and adjacent to the plaintiffs land. It is common ground that if the height of the plaintiffs land was maintained in its original state, then D1 would have to construct a high retaining wall. Hence, any reduction in the height of the plaintiffs land would mean that a lower retaining wall would have to be built, and this would in tum translate into cost savings for D1. There is no doubt that the straightening of the access road was an integral pati of D1's infrastructure plan.

[10] D1's engineering consultants, namely, Perunding PL Sdn Bhd, applied to MPK for approval of the infrastructure plan. To prevent erosion and landslide flowing from the plaintiffs land, D1 proposed to MPK to construct a retaining wall along the road reserve which is several metres away from the boundary of the plaintiffs land. On 20 January 2014, MPK approved D1's proposal for the construction of a reinforced concrete retaining wall and associated earthworks. The infrastructure approval by MPK was subject to various terms and conditions or 'syarat-syarat'.

MPK'S SYARAT-SYARAT

[11] The relevant MPK conditions are:

> SYARAT-SYARAT
>
> 1.1 ...
>
> 1.8 *Adalah menjadi tanggungjawab penuh pihak pemaju untuk mendapat kebenaran lot-lot bersebelahan sekiranva dijangkakan akan berlaku perlanggaraan sempadan*. Pihak MPKj tidak boleh disabitkan sama sekali sekiranya berlaku sebarang perkara berbangkit dimasa hadapan.
>
> 2. KERJA TANAH
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> 2.1 Kerja-kerja tanah yang dicadangkan mestilah dengan *cara selamat kepada harta benda yang berdekatan. Apabila perlanggaraan berlaku (encroachment) kepada harta benda itu, surat kebenaran/Kerjasama mestilah diperolehi terlebih dahulu.* (Emphasis added.)

A UNDERTAKING BY PERUNDING LNTASK

[12] D1's consulting engineers, Perunding PL Sdn Bhd subsequently withdrew as consultants for the project. They were replaced by Messrs Perunding Intask. Perunding Intask sent an undated letter to MPK (received by MPK on 4 July 2014) to inform that they had replaced Perunding PL Sdn Bhd. By the said letter, Perunding Intask *undertook* that *they would supervise* the project and ensure *that MPK's conditions ('syarat-syarat') are complied with*.

[13] This is captured in the following passages of that letter which read:

> Dengan segala hormatnya perkara di atas dan surat kelulusan pelan infrastruktur bertarikh 20hb Januari 2014 adalah dirujuk.
>
> Untuk makluman pihak tuan, Tetuan Perunding PL Sdn Bhd telah melepaskan tanggungjawab sebagai Jurutera Perunding melalui surat perlepasan bettarikh 21 January 2014.
>
> Firma kami telah bersetujui dengan pihak pemaju supaya *mengambil alih segala Iiabiliti kerja inf1astruktur projek ini dan memantau/memastikan semua syarat-syarat yang dikeluarkan dan dicatatkan di dalam surat kelulusan dapat dipatuhi sepenuhnya.* (Emphasis added.)

THE HEIGHT/BOUNDARY OF THE PLAINTIFF'S LAND

[14] In the context of the trespass that took place over the plaintiffs land (*which was discovered on 20 October 2014*), it is imperative to mention that roughly seven months prior to the event, D1 had approached the plaintiff to secure their consent to excavate and trim down the height of the plaintiffs land. It is not in dispute that in February/March 2014, D1 approached the plaintiff with a proposal to 'cut the slope' at the border of the plaintiffs land. Essentially, D1 was attempting to secure the plaintiffs consent to 'trim' the slope. If the plaintiff had gone along with D1's proposal, then it would have been unnecessary to build the proposed ten metre retaining wall. D1 maintains that this would have benefitted the plaintiff as well. The plaintiffs main witness on liability, PW10 (a director and main shareholder of the plaintiff) said that his secretary had infonned D1 that their proposal was rejected.

[15] D1's proposal was as stated in the earthwork plans that were forwarded to the plaintiff on 21 February 2014. Thus, D1 and their consultants would have been aware of the topography and the boundary of the plaintiffs land and critically, the plaintiffs stand that there should not be any earthworks in and over the plaintiffs land. In terms of visibility, it is also relevant to mention that the relevant part of the plaintiffs land (the North-East sector) was somewhat demarcated by a covered walkway. This was plain for all to see.

[16] Thus, anyone having anything to do with the infrastructure would have known that the land beyond the covered walkway and the access road, belonged to the plaintiff. It is not the plaintiffs case that the covered walkway was situated on the plaintiffs land. Rather, the plaintiffs case is that the walkway indicates that the parcel of land behind the walkway, and behind the road reserve, belonged to the plaintiff.

[17] On this point, although DW2 admitted during trial that it would be visible from the entrance of the project that D2's workers were working on the reserve land (which is adjacent to the plaintiff's land), the judge held (at para [52] of the grounds of judgment) that the admission by DW2 'was not proof that the 1st Defendant was actually aware at the material time that the 2nd defendant had trespassed into and had 'cut' the Plaintiff's Land'. Here, it should be mentioned that DW2 was high up in D1's management hierarchy, and was not on the ground, so to speak. The persons on the ground would have been the representative from Perunding Intask and D1's 'clerk of works', Mr Sunil Prasad (also known as 'Andy'). But no one from Perunding Intask testified. And Andy was not called to testify at the trial.

[18] The judge further held that 'there was no evidence of any fence demarcating the boundary to the Plaintiff's land'. Before us, the plaintiff contended that the judge failed to appreciate that the photos (taken before the trespass and on the day of trespass) would demonstrate quite clearly that D2's work was being carried out on the plaintiffs land and that it was impossible that D1 did not know that the land behind or next to the covered walkway belonged to the plaintiff.

[19] According to the plaintiff, the location of the plaintiffs land and its boundary etc, are shown in D1's own survey plan when it approached the plaintifffor consent to cut the plaintiffs land in February/March 2014. Thus, D1 could not feign ignorance of the location of the boundary to the plaintiffs land. As stated earlier, D1's motivation and purpose for making the proposal to the plaintiff was to save costs. This can be clearly seen in an email dated which sent by Nicholas Chang Hon Nyan ('DW2'). DW2 was the Chief Executive Officer of the Adenland Group of Companies. DW2's email to PW10 (which is self-explanatory) reads as:

> From: Nicholas Chang [mailto:changhn06@yahoo.com]
>
> Sent: Monday, 10 March, 2014 11:58 AM
>
> To: roberteo@rsmi.com.my
>
> Cc: chengca@rsmi.com.my
>
> Subject: Re: Adenland — Proposed Earthwork for Taman Kemacahaya
>
> Hi Dato Robert Teo,

Our proposal for the earthwork will have mutual benefit for both parties. Below is the benefits for your consideration.

1. Our initial approved proposal to MPKJ to construct 10 metres retaining wall at the road reserve. With that proposal, is may result in higher construction cost on your end. APEC — The earthworks for your development is not finalized yet. It is likely that this area will be cut in future. The savings for the cut would be very minimal for your side. In addition, in future, you will have to have a cut slope within your land with Lot 5700 since the level is reduced. When the cut slope is within your land, it will be your responsibility to maintain it.

2. With our new proposal, it will provide flexibilities in design, i.e. additional access road at the top of the hill, more gentle slope within your land. Once the 10 metres wall is constructed, its may eliminate this possibility in the future. APEC - The current access is planned at a lower area at around RL 86.50m. It is not likely that you will access from the highest road levels.

3. As your land sit on the lower ground, the 10 metres retaining wall will add as deterrence factor for your future buyers shall you decide to dispose the land. APEC The built retaining wall may become redundant in future when you develop your land.

As for our side, we will enjoyed [sic] some cost saving with this exercise.

Regards,

Nicholas (Emphasis added.)

[20] PW10 said that he rejected the proposal. During the trial, there was some discussion over the veracity of PW10's evidence as to whether his secretary did in fact convey the plaintiffs response. In our view, nothing turns on this because ultimately D1 conceded that they did not procure the plaintiffs consent to cut/excavate, and reduce the height of the plaintiffs land. The final outcome was that the plaintiff never responded favourably to D1's proposal. PW10 said that he did not agree to D1's proposal as *he wanted to retain the height of the land for purposes of the plaintiff's future development. He said that the plaintiff wished to preserve the height of the plaintiff's land since it has always been the intention of the plaintiff to build hill-top bungalows*. PW10 said that he specifically informed D1 of his reasons for not agreeing to the cutting of the slope. PW10's evidence during the trial was as follows:

Well, as I said earlier, when he proposed, Yang Arif, this thing to me and needed thing that I was told, it involved cutting the hill, the top. I immediately did not consider fmiher and *I said no, I won't allow you to cut the height because my idea is to build sort of, a sort of high dse bungalows on that, you know*. So for that, Yang Arif, I have to preserve the height. So I straightaway told him no, I don't agree to it because your proposal involves bringing down the height of my land. That's it. So with that I did not have any reason to go in more detail, Yang Arif, as to what the cross section or all those things and there's my honest answer, Yang Arif, you know. (Emphasis added.)

[21] In so far D1 was concemed, they approached the plaintiff to get their consent to trim the height of the plaintiffs land so as to achieve a so-called 'win-win' result. During cross-examination, it was put to DW2 that D1 was seeking to save costs by building a retaining wall of lower height and that could only be done if the height of the plaintiffs land was cut down. DW2 agreed to the following propositions which were put to him:

> Is basically you were trying to get Dato' Robert Teo to agree to look, once we build this retaining wall, let's not talk about the height ole You were trying to convince him that instead of building this retaining wall, let us cut down your land by that 9.5 to 13.3 ok because that's beneficial to you.
>
> You would have amongst others an access road from the top of your land to Jalan Kemacahaya, I think a gentler slope even if you want to sell the land, right, that will be easier. Because once you have a retaining wall, that's a deterrent and then a number of other reasons. So you were basically trying to tell Dato' Robert Teo look, ok, agree with us, allow us to cut down your land then we don't have to build the wall. And by not building the wall, Mr Nicholas, you get a benefit out of it because cost saving.

D2'S APPOINTMENT

[22] We may now turn our attention to D2's appointment. The genesis of the appointment was D1's letter of award dated 10 September 2014 pursuant to which D2 was appointed to cany out the excavation works. Under the scope of works, D2 was to, 'excavate, cut & dispose excess earth from slope ... preparation of slope & temporary canvas protection of slope'. The quantity of earth to be removed was *3,000m3*. The tenure of the contract was for two months from 15 September 2014 to 14November 2014.

[23] It is important to mention that the construction of the retaining wall was not within the scope of the letter of award. It was only about a year later, that D1 appointed D2 to construct the retaining wall along the road reserve which is several metres away from the boundary of the plaintiffs land. D2's appointment vis a vis the construction of the retaining wall was done via the revised quotation for RC Wall dated 6 October 2015. But the judge had conflated the two jobs (see para [50] of the grounds of judgment). This is seen in the judge's remark where he said:

> ... [50] Although agency was invoked and pleaded in the statement of claim, and the second defendant may be constituted an agent of the first defendant in the circumstances of this case, *there was no evidence that the scope of the second defendant's agency in relation to the construction of the retaining wall included any necessary trespass* onto the plaintiffs land. (Emphasis added.)

[24] The letter of award had clearly and unambiguously stated that D2 is to carry out the works in accordance with the drawings and such work must be to the satisfaction of D1's consultant engineer. The relevant terms under the letter of award are:

> 2. Scope of Works.
>
> *The scope of work shall be as per your breakdown and attached herewith the construction drawing.* All works shall be to the satisfactory [sic] by the Engineer of the abovesaid Project.
>
> You are to provide all labour, materials, equipment and machinery to complete the works to the entire satisfaction of the Engineer. The scope of work shall be as stipulated and read in conjunction with the following:
>
> a) The Contact Documents, which comprise of the Conditions of Contact, Specifications, Bills of Quantities and Drawings.
>
> 3. Commencement and Completion of Work.
>
> Date of Commencement of Works shall be: 15/09/2014
>
> Date of Completion of Work shall be: 14/11/2014
>
> Prior to your commencement of work:-
>
> a) *you may carry out any necessary dilapidation report. This is to safeguarding (sic) you against any claim for damages for neighbouring and existing structures.*
>
> b) *it is your responsible [sic] to counter* check the boundary surveying results. In the event of any discrepancies, you shall immediately notify the Engineer for solutions.
>
> c) you are required to submit the Work Programme for the entire project and Site. Organization Chart complete with the details of the site personoel upon the works for approval.
>
> You shall coordinate, check and ensure that all the plant, equipment, etc., to be delivered to the site in accordance to your work programme, progress of work and site conditions. We will not entertain pre-mature delivery of materials, plant and equipment to site.
>
> ...
>
> 11. Site Supervisor.
>
> *You shall provide a full time competent supervisor at site who has capacity to coordinate and execute the works*. He shall be capable of receiving instructions, notices, attending all meeting and making decisions related to the works throughout the contract period. All notices and instructions received by him shall constitute receipt of such notices or instructions by you.
>
> 12. Quality of Works.
>
> The quality of works shall be of the *best quality and executed by experienced and skilled workers. Any materials delivered or any works found not to the satisfaction of the Engineer shall be removed immediately and replaced as soon as possible. All costs from such removal and replacement shall be borne by you.*
>
> If your cause any damage to completed works executed by others, then the cost of repairing or making good of such damage shall be borne by you.

The Engineer shall reserve the right to reject any unacceptable, defective and/or any sub-standard works. The decision made for the same shall be final and binding. (Emphasis and underlining added.)

DISCOVERY OF TRESPASS

[25] The problem presented itself on 20 October 2014, when PW10, together with his driver (PW1), saw a bulldozer and several lorries engaged in earthworks on the plaintiffs land. PW10 approached someone who appeared to be supervising the earthworks that was taking place. He was identified as Simon Lim, the manager of D2. PW10 said that Simon Lim told him that the works were being done on the instructions of D1. Simon Lim did not testify at the trial. On the same day, PW10 lodged a police report alleging trespass by D2. *D1 claimed that they came to know about the trespass through D2.*

[26] The first post-trespass meeting between the plaintiff and D1 was on 22 October 2014. It may be safely assumed that D1 got to know about the trespass (from D2) somewhere between 20 October 2014 and 22 October 2014. At any rate, on 22 October 2014, parties had started discussions for an amicable resolution. The issue of whether the discussions were held on a 'without prejudice' basis is not relevant. However, the date when D1 got to know about the trespass is important and is mentioned for purposes of fixing or imputing D1 with knowledge of the trespass that was committed by D2. This is because D1's conduct after being informed about the trespass that was committed by D2 is quite revealing. This is elaborated in the later part of this judgment.

CROSS-EXAMINATION ON A POINT THAT WAS NOT PLEADED

[27] As mentioned earlier, PW10 lodged a police report. The investigating officer for the case was DSP Mohammad Fazul bin Che Hassan (PW2). He said that he interviewed Simon Lim and that the latter had told him that he was instructed by D1 to cany out the work, and *that the plaintiff had given their verbal consent.* The judge rejected Simon Lim's utterances as being hearsay. But it is interesting that *during cross-examination of PW2, counsel for D1 pursued the theory that the plaintiff had given their consent for the earthworks.* But it is imperative to note that the plaintiffs purported consent was not even pleaded in D1's defence.

[28] At any rate, looking at the evidence in its entirety, the belated suggestion that the plaintiff consented to the intrusion or encroachment into the plaintiffs land and/or that they permitted the height of the plaintiffs land to be reduced or trimmed, is implausible and inherently improbable. It does not even fit into the factual narrative. It is at best, surmise, conjecture and is in any event, devoid of any basis. There is just no proof whatsoever.

[29] The defence that was filed on behalf of D1 deserves some comment at this juncture. In response to the matters alluded to in the statement of claim the defence was mostly one of 'denial', 'no knowledge' and/or 'put to strict proof'. D1 did not plead any affirmative defence. The questions during cross-examination of PW2 which suggested that the plaintiff had given their consent should not have been allowed at all. Indeed, it is trite that a defendant is not entitled to pursue a defence which has not been pleaded.

[30] In the Court of Appeal decision of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 AMR 333; [2004] 1 CLJ 357 (CA), Gopal Sri Ram JCA (as his Lordship then was) said at pp 365–366 (MLJ):

> [19] Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty-whether in contract or tort — may properly deny liability and require the plaintiff to prove his or her claim. *But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct.* (Emphasis added.)

[31] It is also relevant to hearken to Justice Gopal Sri Ram's reference to the quotation by Lord Evershed MR in *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425 (CA), who said at p 428:

> I think that a defendant — whether he is an underwriter or any other kind of defendant — is entitled to say, by way of defence, 'I require this case to be strictly proved, and admit nothing'. *Where such is the defence, the onus remains throughout upon the plaintiffs to establish the case they are alleging*. Where such is the form of the pleading, it is not only not obligatory upon the defendants but *it is not even permissible for them to proceed to put forward some affirmative case which they have not pleaded or alleged*: and *it is not therefore, right that they should, by cross-examination of the plaintiffs or otherwise, suggest such an affirmative case*. The defendants are acting correctly if they follow the course adopted in this case — that is, so to challenge, at each point, and by proper evidence, where it is admissible, and by cross-examination, the case which the plaintiffs seek to make good. (Emphasis added.)

[32] To be fair, the judge paid no regard to this part of the evidence. But it is nevertheless impmiant to make mention of this as it goes towards demonstrating D1's post-trespass conduct, which in turn, impacts upon their liability to pay any exemplary damages (assuming liability against D1 for trespass is established).

INDEPENDENT CONTRACTOR DEFENCE — NOT PLEADED

[33] It is also important and appropriate to mention at this juncture that another vital issue that was not pleaded in D1's defence was the defence that

D2 was an 'independent contractor' and therefore D1 is not liable for D2's act of trespass. During the trial, the plaintiff objected to the independent contractor defence being raised. The judge took note of the objection. However, as it turned out, D1 succeeded on the independent contractor point, albeit that it was not pleaded. This issue is discussed in greater detail in the later part of this judgment.

[34] Now, although PW10 lodged a police report, the police took no action as they viewed it as a civil dispute. As far as the police were concerned, this was all due to a 'misunderstanding'. The plaintiff also filed a complaint with the engineering division of MPK and the Board of Engineers Malaysia. Following the discovery of the trespass, the parties entered negotiations for an amicable resolution. The plaintiff and D1 then commenced negotiations to settle the matter but these fell through. Subsequently the plaintiff commenced Suit 120 against D1 and D2 for trespass and negligence. The plaintiffs claim was based on trespass and wrongful removal of earth and the levelling of the plaintiffs land. The plaintiff submitted that the wrongful removal of earth by D2 and its servants or agents, had resulted in varying reductions in height along the affected parts (North-East sector) ofthe plaintiffs land.

D2 PAID IN FULL

[35] It is necessary to mention that although D1 had been informed (apparently by D2) of the issue of trespass and the wrongful excavation over the plaintiffs land and removal of earth etc, D1 had no reservations in paying D2 their full monetary entitlements in relation to the earthworks that were executed pursuant to the letter of award dated 10 September 2014. There is no evidence or explanation as to whether Andy knew about the trespass. There is also no evidence or explanation as to whether the representative for Perunding Intask knew about the trespass prior to D2 notifying D1 about the trespass.

[36] Admittedly, there was no deduction or diminution of the payments that were payable to D2 under the said letter of award. D1's conduct in making *full payment to D2* after being made aware that they (D2) had committed trespass over the plaintiffs land, is of course puzzling to say the least. When asked during cross-examination about whether any action was taken against D2 arising from the trespass over the plaintiffs land, DW2 said that D2 was 'verbally reprimanded'. But DW2 conceded that there was nothing before the court by way of any paper trail. He also said that he didn't think about calling anyone from D2 to testify in relation to the trespass incident. He confirmed that on 6 October 2015 (almost a year later), D1 proceeded to engage D2 for the proposed construction of the retaining wall. And as for the retaining wall, according to an 'As-Built Survey' that was conducted in 2018, it showed that the height of the retaining wall built ranging fiom 0.7m to 4.13m. DW2 agreed

A that a retaining wall with a lower height would translate in lower costs for D1.

[37] Counsel for the plaintiff harped on the fact that despite being made aware that D2 had trespassed over the plaintiffs land, D1 paid D2 in full for the work done under the letter of award and went on to give them the contract to B build the retaining wall about a year later (6 October 2015). Counsel for the plaintiff thus invited this court to conclude that such conduct on D1's part amounts to assent, ratification of D2's tortious conduct. Counsel went so far as to say that D1's conduct should be construed as D1 having instructed or authorised the trespass. It was argued that in any event, based on D1's C post-trespass conduct, they should be jointly and severally liable with D2, for the latter's tortious actions.

WITHOUT PREJUDICE LETTERS

D

[38] In seeking to prove its case, the plaintiff sought to rely, inter alia, on their correspondence with D1 relating to the negotiations. The plaintiff knew that this was problematic as, apart from the initial correspondence, many of the letters were captioned as 'without prejudice'.

E

[39] Thus, the plaintiff sought to distinguish the initial part of the settlement negotiations from the latter part of the negotiations. When D1 objected to reliance on the correspondence in their entirety, the plaintiff argued that the initial part of the negotiations was not on a without prejudice basis and F therefore admissible. The negotiations between the plaintiff and D1 went on for almost two years whereby parties were exchanging drawings with proposals and counterproposals. Finally, the negotiations fell through as there was no contract concluded to settle the dispute.

G [40] During the trial, the plaintiff tried to adduce evidence of the negotiations which was objected to by D1. D2 did not enter appearance and did not participate in the trial. The issue of the admissibility of the several letters that were exchanged between the plaintiff and D1 was one of the key issues before the judge.

H

[41] Ultimately, the judge jettisoned all the documentary evidence relating to negotiations as he concluded that those letters, written on a without prejudice basis, are inadmissible in evidence of the negotiations that were attempted between the parties.

I

[42] For our part, we find that the issue of admissibility of the without prejudice communication has no relevance to this appeal, which is solely, if not mainly concerned with D1's liability for the trespass that was committed by D2. In the circumstances, we shall say nothing further about the

correspondence relating to the negotiations between the plaintiff and D1.

THE KEY QUESTION — D1'S LIABILITY FOR TRESPASS

[43] We may add at the outset, that D1 (qua first respondent) did not file any cross-appeal vis a vis the judge's finding that D2 had committed trespass. Hence, D1 accepts that their eatihworks contractor, D2 had committed trespass in and over the plaintiffs land.

[44] And there is also no cross-appeal by D1 to challenge the judge's finding at para [50] of the grounds of judgment that D2 was D1's 'agent'. We therefore approached this appeal on the footing that there is no dispute that D2 was D1's agent and that D2 had committed trespass over the plaintiffs land. Thus, the key question in this appeal is whether in the circumstances, D1 (as D2's principal) should be jointly and severally liable for trespass.

[45] It is important to mention that DW2 confirmed during cross-examination that the purpose of the main access diversion infrastructure works was to straighten the access road which was located from the left to the right. According to DW2, the right part of the access road was 'eating' into D1's land.

[46] DW2 also confirmed that post-construction, the access road was moved away from its existing position of left to right. Instead, it was now in the direction of right to left and D1 had more land to use within its boundary. Thus, after the access road was straightened, the access road was closer to the plaintiffs land and 'parallel' to the retaining wall which was constructed by D2. DW2 agreed that if D1 did not have to build a retaining wall, then it would be a cost savings for D1, and if it had to build a wall of lower height, then that too would translate into cost savings for D1.

[47] According DW2, the proposal was always to build a retaining wall of 6 metres height. And as per the evidence, post-trespass and post-construction, the retaining wall that was built had a minimum height of 0.73 metres and maximum height of 4.13 metres.

[48] DW2 agreed that the retaining wall retains the land behind it and its height is determined by the height of the land behind the proposed retaining wall. He agreed that the site conditions were modified by the reduction of the height and excavation of the plaintiffs land.

[49] DW2 also agreed that during the execution of the earthworks (per the letter of award dated 10 September 2014), Andy (D1's clerk of works), was on duty. DW2 said that the clerk of works was supposed 'to supervise the work by

the contractor at the site'. DW2 confirmed that Andy was still working with D1. He confirmed that Andy would have been on duty when the earthworks were being carried out by D2. But Andy was not called as witness at the trial. There was no explanation as to why Andy did not testify.

[50] DW2 confirmed that D2 was paid in full, meaning there was no deduction for the huge problem that they (D2) had created by the trespass and excavation over the plaintiffs land. DW2 confirmed that by the revised quotation for RC Wall dated 6 October 2015, D2 was awarded the contract to construct the retaining wall.

[51] DW2 agreed that D1 did not seek any 'indemnity' from D2 in respect of the trespass and excavation over the plaintiffs land.

[52] For completeness, we should mention, D1 also did not issue any notice of contribution/indemnity against D2 per O 16 r 8 of the Rules of Court 2012.

[53] Order 16 r 8 of the Rules of Court 2012 reads as:

> 8 Claims and issues between a defendant and some other party (O 16 r 8)
>
> (1) Where in any action a defendant who has entered an appearance —
>
> (a) *claims against a person who is already a party to the action any contribution or indemnity;*
>
> (b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and himself but also as between either or both of them and some other person who is already a party to the action,
>
> then, subject to paragraph (2), the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.
>
> (2) Where a defendant makes such a claim as is mentioned in paragraph (1) and that claim could be made by him by counterclaim in the action, paragraph (1) shall not apply in relation to the claim.
>
> (3) No appearance to such a notice shall be necessary if the person on whom it is served has entered an appearance in the action or is a plaintiff therein, and the same procedure shall be adopted for the determination between the defendant by whom, and the person on whom, such a notice is served of the claim, question or issue stated in the notice as would be appropriate under this Order if the person served with the notice were a third party and (where he has entered an appearance in the action or is a plaintiff) had entered an appearance to the notice.

(4) Rule 4(2) shall have effect in relation to proceedings on a notice issued under this rule as if the words 'seven days after entering an appearance' have been substituted with the words 'fourteen days after service of the notice on him'. (Emphasis added.)

D1'S DEFENCE

[54] It is obvious enough that the focus of D1's defence was the 'without prejudice' issue and by that, D1 was seeking (as they were lawfully entitled to in the circumstances) to ensure that the court did not take cognisance of the contemporaneous documents regarding the negotiations that took place between D1 and the plaintiff. In the process, D1 hardly condescended into any substantive details or particulars vis a vis the trespass over the plaintiff's land.

[55] For example, in response to the plaintiff's averment per the statement of claim per para 6 which read as, 'The 2nd Defendant is and was at all material times a Contractor and/or a servant/agent of the first defendant. The 2nd Defendant inter-alia carried out earth works on behalf of the first defendant', D1 merely responded (per para 11 of the defence) to say that 'Melainkan bahawa Defendan Pertama pernah mengawadkan surat awad kepada Defendan Kedua untuk menjalankan kerja infrastruktur akses utama lencongan ('main access diversion infrastruktur work'), *perenggan 6 dalam Pernyataan Tuntutan tersebut adalah dinafikan dengan sekeras-kerasnya*'. There was no affirmative averment in the defence. Other than implieD1y admitting that D2 was their contractor, D1 did not admit that D2 was their servant or agent. Significantly, D1 did not plead that D2 was an independent contractor.

[56] It is significant to note that in their defence, D1 did not aver that D2 had breached the terms of the letter of award dated 10 September 2014 and further, they did not allege that D2 was on a 'frolic of their own' when they committed trespass and wrongfully cut into and excavated earth from the plaintiff's land.

[57] The focus of the defence was mostly to ensure that the correspondence petiaining to negotiations were not admitted as they were all purportedly written on a without prejudice basis. In their defence, D1 also stressed that it was not reasonable to reinstate the plaintiff's land to its original state. The relevant paragraphs in the defence which is causally connected to the trespass issue are reproduced below:

(1) ...

(2) Melainkan bahawa Defendan Pertama pernah mengawadkan surat awad kepada Defendan Kedua untuk menjalankan kerja infrastruktur akses utama lencongan ('main access diversion infrastruktur work'), perenggan 6 dalam Pernyataan Tuntutan tersebut adalah dinafikan dengan sekeras-kerasnya.

A ...

(3) Defendan Pertama menafikan perenggan 10 dalam Pernyataan Tuntutan tersebut dengan sekeras-kerasnya dan mengatakan bahawa:-

a. Defendan Pertama telah membina satu tembok di luar sempadan
B Hartanah tersebut dengan kelulusan pihak berkuasa; dan

b. Defendan Periama membantah sekeras-kerasnya terhadap perenggan 10 dalam Pernyataan Tuntutan tersebut yang merujuk kepada komunikasi atas dasar tanpa prejudis dan akan memfailkan permohonan untuk membatalkan perenggan yang berkaitan.

C

(4) ...

(5) ...

(6) Selanjutnya dan secara alternatifnya, tuntutan Plaintif untuk mengembalikan semula dan memulihkan Hartanah tersebut adalah tidak munasabah.

D

(7) Kawasan Hartanah tersebut yang kononnya digali adalah terletak di kawasan bercerun dan sempadan Hartanah tersebut. Plaintif perlu mengurangkan kecerunan kawasan bercerun Hartanah tersebut dan/atau meratakan kawasan bercerun Hmianah tersebut untuk membangunkan Hartanah tersebut pada masa
E hadapan. Sebarang kerja untuk mengembalikan semula dan memulihkan Hmianah tersebut adalah tidak munasabah dan akan tersia-sia.

(8) Plaintif perlu mengambilkira anjakan bangunan dari sempadan Hartanah tersebut. Dengan ini, Plaintif tidak dapat membina bangunan di kawasan Hartanah tersebut yang kononnya digali kerana kawasan tersebut terletak di sempadan.

F

(9) Selanjutnya dan secara alternatifnya, tuntutan Plaintif untuk kos mengembalikan semula dan memulihkan Hartanah tersebut seperti dalam perenggan 13 dalam Pernyataan Tuntutan tersebut adalah tidak munasabah dan/atau terlampau tinggi.

G (10) Selanjutnya dan secara alternatifnya, Defendan Pertama menafikan dakwaan Plaintif mengenai pengurangan dalam nilai Hartanah tersebut dan/atau kehilangan peluang memajukan Hartanah tersebut disebabkan oleh penggalian yang didakwa oleh Plaintif dan Plaintif diletakkan beban bukti yang kukuh untuk membuktikannya.

H (11) Defendan Pertama menafikan perenggan 14 dalam Pernyataan Tuntutan tersebut dengan sekeras-kerasnya.

(12) Kecuali sebagaimana yang diakui dengan nyata terdahulu di sini, Defendan Pertama menafikan dan tidak mengakui setiap dan tiap-tiap perkataan yang
I terkandung dalam Pernyataan Tuntutan tersebut seolah-olah ianya dinyatakan di dalam ini dan disangkal dengan khususnya.

(13) Defendan Pertama memohon supaya tuntutan ini ditolak dengan kos dibayar oleh Plaintif kepada Defendan Pertama.

JUDGE'S FINDINGS

[58] The judge held that the removal of earth from the plaintiff's land and reducing it in height without the plaintiff's consent constituted trespass. The judge made a finding that D1 did not lead any evidence to suggest that there was no trespass by D2.

[59] Significantly, the judge exonerated D1 from any liability for the trespass as (he found) there was no evidence that D1 participated in the actual physical act of trespass, or evidence to suggest that D1 had instructed D2 to commit trespass or that D1's plan, which was approved by MPK, would have resulted in the trespass. According to the judge, it was also not proved that the scope ofD2's work (per the letter of award), in relation to the construction of the retaining wall included any necessary trespass. As mentioned earlier, the letter of award had nothing to do with the construction of the retaining wall. The work under the letter of award was essentially for D2 to cut and excavate.

[60] The judge found that there was no proof that D1 was aware that D2 had trespassed into the plaintiff's land. He also held that it would seem unlikely that D1 would have instructed both the cutting of the plaintiff's land and the construction of the retaining wall at the same time as it is expensive to do both. The synopsis of the judge's findings are as follows:

(a) It is clear beyond argument that the removal of earth from land belonging to another and reducing it in height without the consent of the registered proprietor constitutes trespass and that trespass is actionable *per se,* without the need to prove damage. However, it was not established that the first defendant patricipated or was involved in the actual physical act of trespass.

(b) The evidence was that the actual physical act of trespass was committed by the second defendant, whose servants had been found on the plaintiffs land. Clearly therefore the second defendant is liable to the plaintiff in trespass.

(c) It was also not established that the first defendant had instructed the second defendant to commit the trespass or that the first defendant's plans as approved by MPKJ, when followed by the second defendant, would have resulted in the trespass.

(d) Although agency was invoked and pleaded in the statement of claim and the second defendant may be constituted an agent of the first defendant in the circumstances of this case, there was no evidence that the scope of the second defendant's agency in relation to the construction of the retaining wall included any necessary trespass onto the plaintiffs land.

(e) In fact, based on the evidence, there was no good reason to cut into the plaintiffs land as this had not benefited any of the three parties to this case.

(f) Generally, a person may not be held liable for the tortious act of another, but it is a well-established principle of law that an employer may be held liable for the tortious conduct of an employee committed within the course of the employee's employment. This is the principle of vicarious liability.

(g) In the present case, the first and obvious consideration is whether a company, a non-natural person, may be regarded as an employee such that the principle of vicarious liability may apply. The patries had not cited any authorities where vicarious liability was imposed for the tmiious acts of a legal person in the form of a limited company, such as the second defendant, and no decision was made on this.

(h) Although the plaintiff sought to demonstrate the element of control by reference to the letter of award issued by the first defendant to the second defendant, the clauses pertaining to the scope of works and responsibility, clearly gave control to the second defendant.

(i) Based on the letter of award, there was nothing to indicate that the second defendant, a limited company with its own place of business, was not a separate and independent enterprise of its own. In short, the second defendant was carrying on its own business in performing a contract that it had secured from the first defendant and thus was an independent contractor of the first defendant.

(j) The plaintiff sought to invoke the principle of a non-delegable duty of care to impose liability upon the first defendant for the second defendant's trespass, which the first defendant submitted was not pleaded. Even though the term non-delegable duty was not pleaded, the essence of the duty was sufficiently pleaded.

(k) Nevertheless, having regard to the characteristics upon which a non-delegable duty may arise it is clear that those characteristics did not exist in this case.

(l) In the present case, the second defendant was required to build a retaining wall along the road reserve below and away from the plaintiff's land and none of those instances where a non-delegable duty may arise occurred. It was not as if the retaining wall that was erected failed, or that the second defendant was incompetent. It was not trespass or damage caused in the execution or conduct of an inherently hazardous activity.

(m) Instead, what happened here was a conscious act of 'cutting down' the plaintiff's land and the removal of earth therefrom. Thus clearly, the second defendant had gone beyond merely building the retaining wall based on the approval by MPKJ and there existed no exception to the general rule upon which the first defendant may be held liable for the trespass committed by the second defendant.

(n) Case authorities make it clear that reasonableness is a factor for determining the loss suffered rather than for determining between the remedies of reinstatement or diminution in value of the land.

(o) Having regard to the fact that there was no evidence of any diminution to the value of the land or some necessity that the plaintiff's land be reinstated either for reasons such as safety or some intended use, compensation in the amount of the projected reinstatement costs would be umeasonable in the circumstances. As such, special damages suffered by the plaintiff was assessed at RM80,841.78 and general damages in the sum of RM500,000.

(p) In this case no damage had been suffered by the plaintiff that could not be adequately compensated with damages without resorting to aggravated damages. There was no evidence of any conduct on the pmi of the second defendant that warranted additional damages punitive in nature.

(q) As against the second defendant, all that had been established was its trespass. Thus, the normal heads of damages, as opposed to exemplary and aggravated damages, would be appropriate or adequate.

OUR DECISION

[61] Before us it was argued that for the plaintiff, that the judge erred in failing to hold that D2' s conduct in cutting the slope of the plaintiffs land and hence reducing the original height of the plaintiffs land had enabled D1 to reduce the height of D1's retaining wall to be constructed and hence, save costs.

[62] The plaintiff also contended that in light of the fact that D2 was engaged by D1 to carry out earthworks and thereafter to construct the retaining wall, and the fact that a much lower retaining wall was constructed to the benefit of D1 following the cutting of the slope by D2, the judge ought to have concluded that the cutting of the slope could only have been carried out by D2 on the instructions and/or authorisation and/or instigation of D1. The plaintiff also contended that there was no evidence that D1 reprimanded D2 for the trespass.

[63] Further, it was contended that based on D1's conduct in paying D2 for the earthworks which had been carried out, after being put on notice that D2 had committed trespass whilst carrying out the earthwork and subsequently awarding D2 with more works, the judge ought to have drawn the inference that D2's act of cutting the plaintiffs land was done on the instructions and/or authorisation and/or instigation and/or assent of D1. Thus, the plaintiffs case was that looking at the evidence in its entirety, the judge ought to have held that D1 instructed and/or authorised and/or instigated D2 to cut the slope on the plaintiffs land, or had, at any rate, assented to or ratified the same, and was therefore liable for the act of trespass committed by D2 (their agent).

[64] On the other hand, counsel for D1 highlighted that to prevent erosion and landslide in future, D1 proposed to MPK to construct a retaining wall

along the road reserve located below and adjacent to plaintiffs land. D1's proposal to construct a retaining wall along the road reserve located below and adjacent to the plaintiffs land was approved by MPK.

[65] After D1 had obtained the approval from MPK, D1 informed Dato' Robert Teo Keng Tuan ('PW10') (a director of the plaintiff) of the proposed construction of a retaining wall along the road reserve located below and adjacent to plaintiffs land. The retaining wall was to be located several metres away from the boundary of the plaintiffs land. D1 also proposed to PW10 an option to 'cut the slope' at the border of the plaintiffs land so that the plaintiff would have a gentler slope at the border of their land which would allow a better access to Jalan Kemacahaya and D1 would not have to construct any retaining wall which would block the plaintiffs access to Jalan Kemacahaya. PW10 did not revert on D1's proposal.

[66] Hence, D1 proceeded with the initial proposal to construct a retaining wall near the border of the plaintiffs land as approved by MPK. D1 appointed D2 to carry out the 'Main Access Diversion Infrastructure Work'. The letter of award which was issued by D1 to D2 is dated 10 September 2014. This letter of award had nothing to do with the construction of the retaining wall.

[67] The contract appointing D2 to construct the retaining wall as approved by MPK came about a year later via a revised quotation for RC Wall dated 6 October 2015. At any rate, sometime around 20 to 22 October 2014, D1 was informed by D2 that the plaintiff had lodged a police report and also lodged a complaint with MPK as to the alleged trespass and excavation of earth by D2. There is absolutely nothing to indicate whether Andy who was at the site 'supervising' D2, had alerted D1 about the said trespass. There is no evidence as to the scope of Andy's supervisory duties at the site and in particular, whether there was any joint consultation over the plans to identify the location of the boundary to the plaintiffs land.

[68] The primary focus in this appeal is D1's liability for trespass which had been committed by D2. According to the plaintiff, D2 was D1's servant or agent. This was denied by D1. D1 did not plead that D2 was an independent contractor. Thus, the plaintiff had the burden to prove that D2 was D1's agent or servant. We accept that there was no master/servant relationship between D1 and D2 (a corporation). Hence, D2 cannot be D1's 'servant'. But the question is whether D2 was D1's agent. In our view, it takes very little to convince us that D2 was D1's agent for the purposes of the infrastructure work that was to be carried out.

[69] Indeed, MPK gave permission to D1 to carry out the infrastructure work which was legitimately outsourced to D2. By appointing D2 to carry out

the work which they themselves were supposed to carry out, D2 became D1's agent. A

[70] At any rate, our task is made that much easier as the judge had made a finding in para [50] of his judgment that D2 was D1's 'agent' and since there is no cross-appeal by D1, it means that D1 accepts that D2 was their 'agent'. But the judge opined that there was no evidence that it was within the scope ofD2's duty that they had to cut into the plaintiff's land. B

[71] The legal position in so far as the principal's liability for the tort that is committed by an agent is that the principal is not liable for the tort(s) committed by their agent, save where it is established that the principal had given their *prior authority* or *subsequently ratified* or *gave their assent* to the commission of the tort. Thus, to establish liability against D1, the plaintiff must prove that D1 had given their prior authority, or subsequent assent or ratification to the trespass. C D

[72] The law as to a principal's liability for the tort committed by their agent is quite well established and this may be gleaned from the decision of Patteson J in *Freeman v Rosher* (1849) 13 QB 780 where he said at p 1465: E

> It is clear that a principal is not responsible for a trespass by an agent, *unless he gave a prior authority or subsequent assent*. (Emphasis added.)

[73] Similarly, the learned author, Norchaya Talib had stated her book, *Law of Tort in Malaysia* (2nd Ed) at p 384: F

> A person who instigates, procures or authorises another to commit a tmt is deemed to have committed the tort himself. The principle applies even though the authorisation or *ratification is made after the commission of the tort*. (Emphasis added.) G

[74] And as is usually the case, there will be no direct evidence to establish these elements. However, it was submitted for the plaintiff that the chronology of events, raised an irresistible inference that the trespass which was committed by D2 was done on the instructions and/or authorisation and/or instigation and/or assent ofD1. H

[75] According to counsel, such irresistible inference may be valiD1y drawn considering the clear evidence supporting such probability. He referred us to the Federal Court decision of *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131; [1978] 1 LNS 240 (FC) per Raja Azlan Shah Ag CJ (Malaya) (as His Lordship then was) where he said at p 134, that where direct proof is not available, then the court may validity rely on circumstantial evidence: I

> In a *civil case one needs only circumstances raising a more probable inference in favour of what is alleged. An inference from an actual fact that is proved is just as much part of the evidence as the fact itself. Where direct proof is not available it is enough if the circumstances appealling in evidence give rise to a reasonable and definite inference*; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture see *Richard Evans & Co Ltd v Astley* [1911] AC 674, 687. *By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood. It is to be noted that once the right principle has been applied the appellate court has said over and over again that this type of case becomes a matter of fact for the learned trial judge*. (Emphasis added.)

[76] Counsel for the plaintiff criticised the following parts of the judge's grounds of judgment which he said imposed an onerous and unfair burden on the plaintiff to adduce direct evidence to prove D1's involvement or complicity in the tort.

[77] Counsel said that the judge misdirected himself in that he failed to examine the circumstantial evidence which pointed quite irresistibly to the culpability of D1, either as having instigated or authorised, or at the very least, in assenting (or ratifying) the tort after its commission. The paragraphs in the judgment which counsel referred to are:

> [48] It was however not established that the first defendant participated *or was involved in the actual physical act of trespass.* The evidence was that the actual physical act of trespass was committed by the second defendant. Clearly therefore the second defendant is liable to the plaintiff in trespass.
>
> [49] It was also not established that the first defendant had instructed *the second defendant to commit the trespass* or that the first defendant's plans approved by MPKJ, when followed by the second defendant, would have resulted in the trespass.
>
> [50] Although agency was invoked and pleaded in the statement of claim, and the second defendant may be constituted an agent of the first defendant in the circumstances of this case, there was no evidence that the scope of the second defendant's agency in relation to the construction of the retaining wall included any necessary trespass onto the plaintiff's land. (Emphasis added.)

[78] As stated earlier, there is no issue that D2 had committed trespass over the plaintiffs land when they did the excavation works pursuant to the letter of award dated 10 September 2014. The judge also held that under the principle of vicarious liability, an employer may be held liable for the tortious conduct of an employee committed within the course of the employee's employment. D2 was a contractor engaged by D1, but the plaintiff sought to demonstrate the element of control by reference to the letter of award issued by D1 to D2. According to the judge, the clauses in the letter of award pertained to the scope

of works and responsibility placed on D2, rather than control over D2 or how it was to carry out the works.

[79] The judge also held that what D2 was required to do under the letter of award was not pati of the business activity of D1. Under the letter of award, for the main access diversion infrastructure work, D2 was required to excavate, cut and dispose excess earth from the slope. The contract value under the letter of award was RM588,886.50. The evidence showed that D2 had completed their work under the contract and were fully paid without any deduction for the problem which they had created.

[80] The letter of award had clearly and unambiguously stated that D2 is to carry out the works in accordance with the drawings and such work must be to the satisfaction of D1's consultant engineer. The relevant terms under the letter of award have already been reproduced in the earlier part of this judgment.

[81] At the material time when D2 executed the work under the letter of award, D1's consulting engineer was Perunding Intask. But no one from Perunding Intask testified during the trial. The fact that MPK had via letter dated 20 January 2014 given approval for the construction drawings for the road diversion (to straighten Jalan Kemacahaya) does not exonerate D1 from liability for the trespass.

[82] In fact, MPK's letter is ominous as it imposed onerous conditions- that D1 must ensure that if there is to be any encroachment or trespass, then D1 must get the 'consent' of the neighbouring land, ie the plaintiff. Here, there was no consent from the plaintiff. The encroachment into the plaintiff's land was wrongful as D1 never procured the plaintiff's consent. The fact that nothing came out of D1's attempt in February/March 2014 to get the plaintiff's consent would have put D1 on notice and on 'high aleti' that there must be no encroachment into the plaintiff's land.

[83] The plans that were used to get MPK's approval and the letter of award to D2, were the plans that were prepared in September 2013. There was no change in the drawings. D1 went ahead with the same drawings and instructed D2 to excavate from the slope. Whilst the road reserve has a slope, there was also a slope on the plaintiff's land.

[84] There is no doubt that soil was excavated was from the plaintiff's land. Indeed, the judge made a specific finding to that effect. On the issue of trespass, we think that the relevant and pertinent question is — where is the evidence that D1's engineer (Perunding Intask) was satisfied that D2 had carried out the road diversion work including the excavation work in accordance with the letter of award and per MPK's *syarat-syarat?* The answer is — there is absolutely

A no evidence by D1's consultant engineer? In our view, this was a fatal (evidential) omission on D1's part.

[85] A survey which was commissioned by the plaintiff showed, inter alia, that 2,619 cubic metres of earth has been excavated and cut, comprising of
B 2,449 cubic metres from the plaintiff's land (Area A) anD170.6 cubic metres from the road reserve (Area B).

[86] In our view, D1 cannot abdicate liability and responsibility for the tortious actions of its contractor (agent), D2, especially in light of the clear
C provision in MPK's approval letter and the letter of award, which states that D2 has to carry out their work to the satisfaction ofD1's engineer.

[87] Since D1 did not produce any witness from Perunding Instask and as there is no evidence of any consent from the plaintiff and since D1 had fully
D paid D2 and went on to give them the contract about a year later (6 October 2015) to construct the retaining wall, the irresistible inference is that D1 had no issues with D2's tortious conduct (trespass). Thus, we find that by their cumulative conduct, D1 had condoned, acquiesced to, or ratified D2's tortious
E conduct.

[88] In amplification, it is important to mention that between 20–22 October 2014, D1 was aware that the plaintiff had lodged a police report (20 October 2014). Indeed, by 22 October 2014, parties had already met. So D1
F would have been aware of the plaintiffs allegation of trespass. Yet, D1 found it fit to pay D2 in full for the work done under the letter of award. When asked during cross examination, D1's witness said that D2 was 'verbally reprimanded' for the trespass over the plaintiffs land.

G **[89]** We find D1's answer of verbal reprimand to be inherently incredible. The answer stretches the credulity of the court. The answer by DW2 does not have any ring of truth to it. It is highly improbable that a contractor who had not complied with the letter of award and caused D1 to breach the MPK *syarat-syarat* and had been 'verbally reprimanded', would have been paid in full,
H and subsequently given the contract to construct the retaining wall a year later on 6 October 2015.

[90] The evidence suggests quite irresistibly that D1 was indifferent to the trespass by D2. It just didn't matter. Although D1 did enter into negotiations
I with the plaintiff to settle the matter, nothing came out of the discussions. After all, the project was time-sensitive, and D1 obviously needed the work to be executed without any delay.

[91] Ultimately, the evidence showed that D2 constructed a retaining wall of

between 0.7m to 4.13 metres which is lower than the drawings that were prepared in September 2013. The body of evidence, when examined as a whole, points to the inference that D1 paid scant regard to the sanctity of the plaintiffs rights as landowner despite having knowledge that the plaintiff had refused to give their consent to reduce the height of the plaintiffs land. D1 was aware that the plaintiffs land was not to be encroached upon, save with the plaintiffs consent.

[92] Quite apart from the plaintiffs stand in declining to give their consent, D1 was under a duty/obligation to comply with the conditions or *syarat-syarat* which had been imposed by MPK. It is important to recall that D1's consultant Perunding Intask had informed MPK that they would do the following:

> Firma kami telah bersetujui dengan pihak pemaju supaya mengambil alih segala liabiliti kerja infrastruktur projek ini dan memantau/memastikan semua syarat-syarat yang dikeluarkan dan dicatatkan di dalam surat kelulusan dapat dipatuhi sepenuhnya.

[93] Thus, if D1's consultants had done their job, then there would or should have been full compliance with MPK's 'syarat-syarat'. But that just did not happen. MPK's 'syarat-syarat' was egregiously breached due to lapses on the part of D1, D2, Perunding Intask and Andy. D2 had obviously committed trespass. There is no evidence that D2 even consulted the drawings to determine the boundary of the plaintiffs land. There is no evidence as to the role of Perunding Intask.

[94] Lastly, there is no evidence as to Andy's role. Andy was D1's clerk of works and he was there (apparently) to supervise D2's performance. Andy did not testify although at the time of the trial, he was still working with D1. He was a highly relevant and material witness. He should have testified. So too with Perunding Intask. They should have testified. In our view, given the circumstances, if Andy and the engineer from Perunding Intask had testified, their evidence would in all likelihood, have been unfavourable to D1. Hence, we are satisfied that this is a fit and proper case for an adverse inference under s 114(g) of the Evidence Act 1950 to be drawn against D1, by reason of the non-calling of these witnesses.

[95] We also find that based on the terms ofthe letter of award for earthworks (which is separate and different from the contract for the retaining wall), D1 had some control over D2. Such control is manifest through the term which made it mandatory for D2 to carry out the work to the 'satisfaction' of D1's engineer. In our view cll 2, 7(g), 11 and 12 of the letter of award collectively gave D1's engineer the requisite degree of 'control' over D2's execution of the earthworks.

[96] Whilst D1's engineer may not have control over the way D2 carried out their work, D1 nevertheless had control by ensuring that D2 followed the drawings and did the excavation only on the road reserve, and not on the plaintiffs land. There is no evidence of such supervision or monitoring by D1's engineer. One would have expected to see some paper trail between D1's engineer and D2 eg, minutes of site meetings, email or memo etc from the engineer to D2. There is also no evidence of what Andy did at the site.

[97] Particularly, the court is entitled to know whether Andy had ensured that D2 consulted the drawing and plans and kept a keen eye on the boundary of the plaintiffs land. Andy's presence at the site when he was supposed to be supervising D2's performance in our view qualifies as D1 'participating' in the execution of the works by D2. Andy was a crucial witness. Andy's absence from the witness box is therefore most glaring. It appears that no one from D1 or D2 were concerned about the boundary to the plaintiffs land so long as the access road was straightened and the costs to construct the retaining wall was minimised. Of course, this may be speculative, but there are subtle tell-tale signs which indicate that boundary rights were not impmiant to D1 in the overall scheme of things.

[98] We turn now specifically to Perunding Intask's supervisory duties. From the evidence, it is undeniable that D2 was to be supervised by Perunding Intask and by Andy, whose duty it was (according to DW2's evidence) 'to supervise the work by the contractor at the site'. Hence, there were two operative supervisory parties at all material times.

[99] In those circumstances, we do not see how D2 can be an 'independent contractor'. Of course, how D2 carried out their work will be dependent on their own skill and competence, but the fact that Perunding Intask and Andy have supervisory or superintendent roles, denudes D2's so-called independent contractor status.

[100] Thus, at any time during the gestation of the earthworks, Perunding Intask or Andy, if they had been monitoring the situation, could have intervened and instructed D2 to scrupulously follow the plans and stay clear of the boundary to the plaintiffs land.

[101] Of course, D1's short answer is that the letter of award had clearly and unequivocally stated that D2 is 'responsible to counter check the boundary surveying results'. That is of course quite correct. But does that mean that Perunding Intask and/or Andy had no role in regard to the boundary issue? Since D1 was fully aware that the plaintiff had not consented to any reduction of height and that they wanted to maintain the height so as to be able to develop their land by constructing hilltop bungalows, was it not imperative

that the boundary issue be carefully and scrupulously monitored by all the parties concerned? In our view, since Perunding Intask were under a duty to ensure that the MPK's *syarat-syarat* are complied with, and as Andy was at the site to supervise the work by D2, the judge fell into error in concluding that D1 did not participate in the execution of the works by D2.

[102] On the contrary, we find that Perunding Intask ought to have participated but there is no evidence as to what they did at the site to ensure that MPK's *syarat-syarat* were complied with. We also do not know what Andy did at the site. But DW2 said that Andy would have been at the site.

[103] It is clear that via the superintendent/supervisory role of Perunding Intask and the supervisory role of Andy, D1 had 'participated' in the execution of the works by D2, such that liability for the trespass that was committed by D2 is also attributable to D1. On that analysis, we would conclude that D1 had assented or acquiesced to the trespass.

[104] As mentioned earlier, if parties had done their part, then they would have known where the boundary was and they would have ensured that D2 stayed clear of the boundary to the plaintiffs land. And as rightly submitted by counsel for the plaintiff, it is impossible for D1, D2, Perunding Intask and Andy not to know where the boundary was.

[105] First, they had the plans which would have shown where the boundary was. Next, there was the covered walkway, which would have indicated that the land beyond the reserve land belonged to the plaintiff. Looking at the evidence in its entirety, the inference seems quite irresistible that the parties were either deliberately indifferent to the boundary to the plaintiffs land or were recklessly indifferent to the boundary. Either way, D1 becomes liable for the trespass.

[106] In any event, even if we are wrong in our conclusion that the D1 had 'assented' to the trespass, there is still the issue of ratification of the trespass.

[107] In this regard, D1 had absolutely no answer or explanation as to why they paid D2 in full despite being put on notice that D2 had committed trespass, wrongfully excavated and removed earth form the plaintiffs land and reduced the height of the plaintiffs land.

[108] D1 had no explanation as to why they subsequently rewarded D2 with yet another contract, a year later whereby D2 was to construct the retaining wall. As we said earlier, DW2's evidence that D2 was verbally reprimanded is quite unbelievable and wholly improbable in that it is highly unlikely that D1 would have paid D2 in full and given them another contract after having purportedly reprimanded them.

[109] Thus, the only plausible explanation is that D1 was not concerned about the legal effects or implications of D2's tortious conduct vis a vis the encroachment on the plaintiffs land. Thus, we find that cumulatively, D1's conduct constitutes post-trespass acquiescence of the trespass that was committed by D2.

[110] We turn next to Andy's role. There is no evidence that Andy did his job (whatever it may be). If he did his job and D2 committed trespass under his watch, then the inference is that D1 (through Andy) had instructed or acquiesced to D2's conduct. What else can it be? DW2 had said that Andy was still working for D1. This means that Andy had not been dismissed for any work related negligence or poor performance. If we were to take a few steps back and examine the events, then the inference is inescapable that Andy who was supposed to supervise D2, had gone along with or turned a 'blind-eye' to D2's act of trespass. The question is — was the boundary ofthe plaintiffs land so obfuscated and unnoticeable that Andy and D2 got it so wrong? We hardly think so.

[111] The evidence points in one direction only. And it is this. D1 knew where the boundary to the plaintiffs land was. They specifically drew D2's attention to the need for D2 to mark out the boundary before commencement of the work. And so, the question is — did D2 mark out the boundary before commencing the earthworks? After all, D2 was supplied with all the drawings and plans. Andy would or should also be privy to the said documents. He was at the site to ensure that D2 complied with the terms of the letter of award. Was Andy aware of the boundary to the plaintiffs land and of the trespass by D2, or was he oblivious or indifferent to it?

[112] Clearly Andy was a critical witness to the proceedings before the High Court. And he was still working for D1 at the time when the trial was in progress. Why wasn't Andy called as a witness? It is obvious enough that it would have been just too risky for D1 to call Andy as a witness as his evidence may have been problematic for D1. Hence, if Andy had been called, his evidence would in all probability, have been unfavourable to D1.

[113] The other person who should have been called is Simon Lim. Since D2 was D1's agent, it would have been more appropriate for D1 to have called him as a witness. At any rate, there is no property in a witness (see *Harmony Shipping Co SA v Saudi Europe Line Limited ('The Good Helmsman')* [1979] 1 WLR 1380 (CA)). There was no impediment to Simon Lim being called to testifY. Clearly, Simon Lim was not called as his presence during the trial would have been too risky for D1. D1's reluctance to call Simon Lim as a witness is another reason why an adverse inference should be drawn against D1 for their culpability for the tort of trespass.

[114] There are several bits of compelling circumstantial evidence which fixed D1 with liability for trespass. First, is D1's conduct in remunerating D2 in full (as per the letter of award) despite knowing (at least by 22 October 2014) that D2 had committed trespass and had created a potential legal problem for D1.

[115] Next, D1 did not even seek an indemnity from D2 for the potential legal dispute that was on the horizon. Then, there is also no paper trail of any reprimand by D1 to D2. DW2's mere say-so that there was a verbal reprimand was a convenient answer at the spur of the moment during cross-examination and is evidence that hardly inspires any confidence as to its believability. The answer that DW2 gave is just too incredulous to be true. And ultimately, there was just no explanation why D1 paid D2 in full despite knowing that D2 had committed trespass over the plaintiffs land and that a lawsuit (by the plaintiff) was imminent unless the dispute was settled. The final nail in the coffin (so to speak) is D1's conduct in appointing D2 (6 October 2015) to construct the retaining wall.

[116] We turn next to the issue of'independent contractor'. D1 did not plead that D2 was their independent contractor. Indeed, at best, D1 had only denied that D2 was their servant or agent. Nothing more was pleaded. The question is — must the defence of independent contractor be pleaded? In *Steven Phao Cheng Loon v Highland Properties Sdn Bhd* [2000] 4 MLJ 200; [2000] 4 CLJ 508 (HC) Justice James Foong (later FCJ) said (at first instance):

> Preliminary issue
>
> Having determined the facts I shall now proceed to apply it to the law. The legal principles applicable to the liabilities of negligence and nuisance have been extensively set out in the course of my analysis into the liabilities of other defendants. I do not propose to repeat them here unless necessary and relevant. Before I proceed to discuss each of the causes of action individually, I shall first deal with an issue raised by the seventh and eighth defendants that is common to both the claims of negligence and nuisance.
>
> This relates to the assertion by the seventh and eighth defendants during submission that they should not be made responsible for the acts of their independent contractors. According to the seventh defendant, they have granted an exclusive power of attorney to one Dato Loy to develop the Metrolux land, and Dato Loy in turn gave a power of attorney to the eighth defendant to manage the development. Instead of handling the development themselves, the eighth defendant declares that, by a power of attorney, they appointed a firm of contractors known as MBf Construction Sdn Bhd to carry out this job.
>
> Thus by these series of appointments, *these two defendants argue that: they were not in possession of the land and they are not liable for the acts of their independent contractors.*

Obviously, *this approach is an afterthought for it was never pleaded in the statement of defence of these two defendants.* In fact, on the contrary, as pointed out by the plaintiffs' counsel, these defendants in para 10 of their statement of defence admitted to have conducted ordinary building works on the said land. With such an admission, I do not think they can raise this issue of exemption of liability for the work done by independent contractors at this stage. To support this is my decision in *Metraplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995]2 MLJ 276(at p 285) citing the oft-quoted judgment of Sharma J in *Janagi v Ong Boon Kiat* [1971]2 MLT 196, which is:

> *The court is not entitled to decide a suit on a matter which no issue has been raised by the parties. It is not the duty of the court to make a case for one of the parties when the party concemed does not raised or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings.*
>
> *The trial suit should be confined to the pleas on which the parties are at vatiance.* Further, even if this issue is allowed to be raised, I am not convinced that these defendants can be exempted from the liability for the acts of their independent contractors. As a general rule, it is true that an employer of an independent contractor is not liable for the fault or negligence of such a contractor. But there are exceptions. One such exception relates non-delegable duty. (Emphasis added.)

[117] The next case is *Say Chong Sdn Bhd & Ors v Chuah Guat Kooi (P) & Ors* [2009] MLJU 526; [2009] 1 LNS 590 (HC) where Justice Hashim bin Dato' Haji Yusoff (as he then was) said:

> Court's Findings
>
> Although the first defendant had filed her statement of defence, she never even came to court and never gave evidence to contradict or rebut the plaintiffs claim. In *Ng Ben Thong & Ors v Krishnan all Arumugam* [1998] 5 MLJ 579 the defendant was absent at the close of the plaintiffs case. The court held inter alia:
>
> Held
>
> (1) The party has to adduce evidence to substantiate its pleadings ...
>
> Therefore the plaintiffs' evidence against the first defendant remains unchallenged, unrebutted and uncontradicted.
>
> Also, looking at the documentary evidence (exh D5(61)a), it was the contract award between the first defendant and the contractor. The engineer (fourth defendant) and the architect also confirmed that it was the first defendant who appointed them and the contractor (third defendant). Exhibit D57, D58 and D59 confirmed that it was the first defendant who appointed the fifth defendant.
>
> Also the insurance policy (exh D38) states the first defendant as the principal under the policy. Based on the above, I cannot accept the unsubstantiated defence of the first defendant that she never appointed the third, fourth and fifth defendants.

Neither did she plead in her defence that the third, fifth and sixth defendants were her independent contractors.

Therefore the first defendant cannot rely on the defence of independent contractors (see: *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; and *Ng Ben Thong*'s case. The first defendant would therefore be liable for the acts or omissions of each and every other defendant appointed by her. (Emphasis added.)

[118] For completeness, it should be mentioned that in *Desiree Couture Sdn Bhd & Anor v Anne F Co Ltd & Ors* [2016] 10 MLJ 315; [2016] 2 CLJ 942; [2015] AMEJ 1799 (HC) Azizul Azmi Adnan JC (as he then was) said:

Vicarious Liability

[44] The relevant principles of law with respect to vicarious liability in the context of a defamation action may be summarised as follows:

(a) the Court of Appeal in *UG Hotel Property Sdn Bhd v Chee Soo Lam & Anor* held that vicarious liability does not apply in a defamation action, as only the person who had published the defamatory statement can be held liable. This principle was subsequently applied in another Court of Appeal case, *RHB Bank Bhd v Moon Trading Sdn Bhd*;

(b) an employer or principal is liable for the acts of its employees, servants and agents, but not for the acts of an independent contractor. Whether a person is an independent contractor is a question that has to be determined from the facts of the case, and in doing so the court must look beyond the appellations and labels that the parties may attached to one another in describing their relationship; and

(c) the applicable test in determining whether a person is an independent contractor or a servant/agent is that set out in *Honeywill & Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd*, applied by the Malaysian Court of Appeal in *RHB Bank Berhad v Moon Trading Sdn Bhd:*

> The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.

[45] The first defendant and Hup Lik entered into an agreement dated 18 October 2012 to govern the provision of debt collection services by the latter to the former. This agreement expressly provided for an obligation on Hup Lik to comply with applicable laws. Accordingly, there is no question that the first defendant did not specifically authorise Hup Lik to publish the defamatory statements. In my view, a possible exception to the rule expounded in *UG Hotel Property Sdn Bhd v Chee Sao Lam & Anor* (that vicarious liability does not apply in a defamation action) would be where the master or principal expressly authorises the servant or agent to make the defamatory statement. That was not the case here.

[46] At cl 5.1 of the agreement, Hup Lik was described as an independent

contractor. The nature of this relationship was corroborated by the second defendant, who testified in court that neither he nor the first defendant determined the mrumer in which the debt collection services were to have been conducted.

[47] I accordingly find that Hup Lik was an independent contractor, and that the first defendant was not liable for the acts of the former by reason of the application of the principles of vicarious liability.

[48] *It was advanced for the plaintiffs that the independent contractor point was not specifically pleaded, and therefore the defendants ought to be precluded from raising it in argument. I am unable to agree, for the following reasons*:

(a) the defendants had stated in their defence that the first defendant had appointed Hup Lik to collect the debt that was claimed to have been owed by the first plaintiff, and that an agreement had been entered into for this purpose. This agreement was included in the trial bundles. *While the defendants did not specifically use the term 'independent contractor', it was clear that the first defendant was looking to the existence of the debt collection services agreement to exonerate itself from any wrongdoing. It is trite law that only material facts and not legal consequences need be pleaded.* It is the role of the court to consider and draw conclusions on the legal result of the pleaded facts (see *RHB Bank Berhad v Moon Trading Sdn Bhd,* at para 44).

Accordingly, it was sufficient for the defendants to plead the existence of the debt collection services agreement, and it will be for the court to determine whether or not the terms of the agreement created any liability for the first defendant for acts of Hup Lik; and

(b) in any event, the plaintiffs cannot claim to have been surprised by the defence that Hup Lik was an independent contractor. Directions were given for the trial bundles to be filed by 15 May 2015, and trial commenced in mid-July, concluding on 26 October 2015, giving the plaintiffs ample time to review the documents to be adduced at trial. It would have been clear from even a cursory review of the debt collection services agreement that it described the debt collector as an independent contractor. The question that arises is whether the second plaintiff could have led any evidence to rebut the assertion that Hup Lik was an independent contractor. I am of the view that she could not, and hence not only was she not taken by surprise by the argument raised by counsel for the defendants, but also her case was not prejudiced by it. (Emphasis added.)

[119] We are of the view that the defence of independent contractor must be specifically pleaded. It is a vital point and if it succeeds, then a claim may be dismissed on that point alone. It can be decisive of the outcome of the case as a whole.

[120] In pleading that the contractor was an independent contractor, a defendant such as D1, would have had to state unequivocally that they had appointed a competent contractor who canied out his task without any control or supervision as to how the latter performed the job. Then the plaintiff would have had an opportunity of rebutting the defence by way of a reply to the

defence, to state that the defendant had engaged an incompetent contractor, or that there was a non-delegable duty, and responsibility for the task could not have been delegated to a contractor, as the task was part of a duty, which was 'non-delegable'. A

[121] But here, nothing whatsoever was pleaded in relation to D2 being an independent contractor as D1's focus was to keep the letters emanating from the negotiations out of curial scrutiny. In our view, D1 made a crucial mistake in omitting any reference to D1 being their independent contractor. But looking at the evidence, it seems quite clear that as far as MPK was concerned, it was D1 who had to comply with the *syarat-syarat* and this is underscored by the fact that Perunding Intask gave an assurance to MPK that they would ensure that the *syarat-syarat* are complied with. B C

[122] Next, the terms of the letter of award also made it clear that the work must be to the satisfaction of D1's consulting engineer. Finally, Andy was at the site 'supervising' D2. All of these only go to show that D2 was not really 'independent' as they were being supervised or monitored by two other parties. D

[123] So, the question is — how did the trespass occur when D2's performance was supposed to be supervised by Peruding Intask and Andy? The answer is — those who could provide the answers were not called to testify. This was a tactical mistake with serious implications to D1 in terms of their liability for the trespass that was committed by D2. E F

[124] Thus, based on the pleadings as they stood at the commencement of the trial, all that the plaintiff had to prove was that D2 was D1's servant or agent. At any rate, the judge found that D2 was D1's agent. In light of D2's appointment per the letter of award, we think that it can hardly be disputed that D2 was D1's agent at all material times when they executed the works for purposes of the main access diversion works. G

[125] The issue of 'independent contractor' did not feature in D1's defence. But the independent contractor defence seemed to take a life of its own and ultimately, succeeded. We should add that the plaintiff did protest at D1's stance in bringing up the independent contractor point during the trial, albeit that it was unpleaded. However, the judge allowed D1 to pursue the defence of independent contractor although there was no specific plea on this vital issue. H I

[126] The judge held that D1's general denial of the plaintiffs contention in the statement of claim that D2 was D1's 'servant/agent' is sufficient for D1 to pursue the defence that D2 was an 'independent contractor' without the need to have pleaded the same specifically. The notes of proceedings show that the

A plaintiff did not condone or acquiesce to D1's attempt at referring to D1 as independent contractor.

[127] In this regard, it cannot be denied that all along counsel for the plaintiff had objected to D1's attempt at referring to D2 as an independent B contractor but D1 chose not to amend their defence. We also note that the question whether D2 was an independent contractor was not framed as an issue to be tried.

C **[128]** It is not in dispute that throughout the proceedings before the High Court, counsel for the plaintiff had recorded their objection to D1's reliance upon the defence of 'independent contractor'. Despite the objection by the plaintiff, D1 chose not to amend their defence. In our view, D1 was not entitled to pursue such a defence and the judge ought not to have allowed D1 D to raise the independent contractor point. This legal position is trite. See: The Court of Appeal decision of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004]1 CLJ 357; [2004] 1 AMR 333 (CA).

E **[129]** Before we leave this point, we should say that the law is firmly established from several decisions of the Federal Court that a judgment is unsustainable if it was decided contrary to the pleadings before it.

[130] In *Saiman bin Umar v Lembaga Pertubuhan Peladang and another* F *appeal* [2015] 6 MLJ 492; [2015] 9 CLJ 153; [2015] 6 MLRA 248 (FC) the Federal Court observed; '[41] that while the parties are bound by their pleadings, *it is therefore necessary to make the point that the court is also bound by the pleadings in as much as the parties themselves*'.

G **[131]** In *Ambank (M) Bhd v Luqman Kamil Mohammed Don* [2012] 3 MLJ 1; [2012] 3 CLJ 551; [2012] 1 AMCR 546 (FC), the Federal Court noted that a plaintiff would not be entitled to judgment on liability if material facts relied upon are not pleaded and if 'its pleaded case ... is different from the plaintiffs case presented and advocated in court for which judgment was sought H against the defendant' (at [21] and [28]). In *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2015] AMEJ 1824 (FC) the Federal Court reiterated [30] that 'where a *vital issue was not raised in the pleadings* it could not be allowed to be argued and to succeed on appeal' (at [30]).

I **[132]** In the result, on the liability question, for the several reasons articulated above, it is our conclusion that D1 is liable for the tortious act of their contractor (agent), D2. For the reasons mentioned above, we are satisfied that the decision of the judge in holding that D1 is not liable for the trespass

which was committed by D2 (D1's so-called independent contractor) was plainly wrong, and appellate intervention is therefore warranted.

[133] We turn next to the issue of *quantum*. D1 did not dispute that the plaintiff was entitled to the cost of the earth that was removed. As we said earlier, the plaintiff is aggrieved that they were not awarded reinstatement cost of RM1,362,405 for a 6.4 metre wall. Although there was evidence on the design by DW3 and counter-estimation by DW4 as to of how much it would cost to build a retaining wall of 6.4 metres, we are of the view that the plaintiff should have been awarded the sum of RM1,362,405 as reinstatement cost. It was submitted that PW7's design was 'tentative' and the design was not final, due to inaccuracy of number of bore holes, pile size, lack of soil test etc.

[134] PW7 said that the design will be finalised before construction. But PW7 was of the view that whilst there could be some changes, the design was final. PW7 had clearly explained during cross-examination regarding the 'bore holes'. He said two bore holes was good enough to come up with a design (see p 134 encl 45). There was no expert rebuttal report by D1. As for the height of the retaining wall (6.4m), he said it would bring the land back to its earlier (2008) profile.

[135] In fact, he said it would need an 11.0 metre wall which would have been a very uneconomical and very expensive solution. Hence, he did not think that it was reasonable to do an 11.0 metre wall. A wall with height of 6.4 m was in his view, sufficient. The judge opined that the design was tentative. We disagree with the conclusion that was reached by the judge. Although the design was subject to some change, it was nevertheless final. DW3 (Ir Tan Ah Chai) came up with a so-called alternative design but his design itself was not intended for purposes of reinstating the land to somewhat its original profile.

[136] The fact that PW7's proposed design was located on the reserve land is not at all surprising because the existing retaining wall that was built by D2 was itself built on reserve land. In our view, the fact that the plaintiff had not obtained MPK's approval for the construction of a retaining wall of 6.4 metres is not a bar to an award (reinstatement cost) being granted. See: *Arnica Corporation Sdn Bhd v Robert Teo Keng Tuan & Anor & Other Appeals* [2016] 2 MLJ 119 ; [2015]1 LNS 1220 (CA).

[137] It is also relevant to mention that the judge declined to award reinstatement cost because he felt that there was no evidence of any necessity for the plaintiffs land to be reinstated either for reasons such as safety, or some intended use. As such he concluded that reinstatement cost would be unreasonable in the circumstances. But PW10 had stated that when he met D1's representatives in February/March 2014 he had told them that he wanted

to maintain the land in its original state so as to develop the land by constructing hill-top bungalows.

[138] We do not see why the plaintiff should be deprived of reinstatement cost just because they did not produce tangible evidence of an imminent development hill-top bungalow project. As a landowner, it is up to the plaintiff to choose the timing of their project. All that the plaintiff wanted was for the height of the land to be reinstated to its original state. We are of the view that there is no basis for the plaintiff to be deprived of reinstatement cost as that would be just unjust. On the flip side, by not paying any reinstatement cost, D1 and D2 have got away lightly and the tortfeasor can be said to have been unjustly enriched. The question is whether reinstatement cost can only be allowed where there is evidence of an intended development? We do not think so.

[139] As a landowner, the plaintiff is entitled to have their land reinstated to its original state or the diminution in value. Here there is no diminution in value, but that does not mean that the plaintiff are disentitled to reinstatement cost. In our view, there is no reason why the plaintiff should be deprived of reinstatement cost.

[140] Next is the question of aggravated and exemplary damages. In the Court of Appeal case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur* [2018] 1 MLJ 784; [2017] 1 LNS 500 (CA) the court defined aggravated and exemplary damages at p 797 as follows:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been *intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.*
>
> [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are *additional damages awarded with reference to the conduct of the defendant. to signify disapproval,. condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent. or punitive and retributory. and the award may also have an important function in vindicating the rights of the plaintiff* … (Emphasis added.)

[141] Based on the facts of the case, it was submitted for the plaintiff that D1's conduct in assenting or ratifying the trespass (by D2) was calculated to make a profit. Counsel said that it was a case of a developer, ie D1 with a cynical disregard for the rights of a neighbouring landowner, ie the plaintiff, who has

calculated that the money to be made out of its wrongdoings will probably exceed the damages at risk.

[142] According to the plaintiff, D1 would probably have thought that the act of trespass would have gone unnoticed since it was committed on a piece of land which is not occupied, except that by sheer coincidence, the plaintiff caught D2 in the act whilst performing the engagement entrusted to it by D1.

[143] Looking at the facts here, it is clear to us that D1 was seeking to gain at the expense of the plaintiff. D1 knew from the inception, ie the February/March 2014 encounter with the plaintiff, of the plaintiffs wishes to maintain the height of its land as it was planning to develop hilltop bungalows, and thus, by 'cutting' the slope and reducing the height, it would deprive the plaintiff of such a plan. Counsel argued that D1 ignored the implication that would be caused by the trespass. Counsel invited the court to impose an award of exemplary damages to show that the rights of landowners, such as the plaintiff, cannot be broken with impunity. We agree. The facts here are such that the conduct ofD1 is plainly egregious and exemplary damages are warranted. In the circumstances of this case and considering D1's conduct in their entirely, we feel that this is a fit and proper case to award general and exemplary damages in the sum of RM500,000.

ORDER

[144] In the circumstances, we find for the plaintiff and allowed the appeal. The order of the High Court dated 19 June 2019 which dismissed the claim against D1 is accordingly set aside. We order judgment to be entered jointly and severally against D1 and D2 as follows:

(a) the sum of RM80,841.78 as special damages;

(b) the sum of RM73,4 70 being the value of earth that was removed from the plaintiffs land;

(c) the sum of RM1,362,405 as reinstatement cost;

(d) RM500,000 as general and exemplary damages;

(e) interest on special damages, reinstatement cost, value of eatih and general and exemplary damages at the rate of 5%pa from the date of filing of this action, 6 March 2017 to the date of full realisation; and

(f) the order of costs that was awarded in the High Court is set aside and is substituted with an order of costs to the plaintiff (appellant) in the sum of RM150,000 (subject to allocatur) as costs here and below.

Order accordingly.

Appeal allowed; order of High Court set aside with costs of RM150,000 here and below subject to allocatur.

Reported by Dzulqarnain Ab Fatar